

violation against Bucknum.¹ Instead, Plaintiffs have suggested in a separate filing, without citation to any relevant or proper authority, that they need not plead a predicate violation against Bucknum to maintain a Section 20A claim against him, so long as they have plead a predicate violation against another defendant. (*See* Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Revised Motion to Dismiss the Consolidated Class Action Complaint, p. 29). The suggestion, however, is frivolous. Having failed to plead a predicate violation against Bucknum, Plaintiffs cannot maintain a Section 20A claim against him.²

Second, it is also a prerequisite to the maintenance of the Section 20A claim that Plaintiffs plead, with particularity, facts sufficient to establish that they traded “contemporaneously” with respect to each of the four allegedly wrongful sales by Bucknum. However, not only have Plaintiffs failed to plead with particularity that they traded contemporaneously with Bucknum, but it is clear from the Amended Complaint that they cannot establish this essential element, which is construed very narrowly in this jurisdiction. Plaintiffs’ failure to satisfy this requirement serves as an independent basis for dismissing the sole claim against Bucknum.

Third, Plaintiffs have failed to allege their Section 20A claim against Bucknum with sufficient specificity to satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b). Nowhere in Plaintiffs’ endless Amended Complaint do they provide any specific

¹ As Plaintiffs expressly stated in the Amended Complaint: “Plaintiffs bring a claim against Defendant Bucknam solely pursuant to Section 20A of the Exchange Act.” (Amended Complaint, ¶ 38).

² Even if Plaintiffs’ suggestion had merit, their claim against Bucknum must still be dismissed, as they have not adequately plead predicate violations against the other defendants. To that end, Bucknum hereby incorporates the arguments made in support of the motion to dismiss filed by and on behalf of defendants Biogen, James C. Mullen, Burt A. Adelman, Peter N. Kellogg, William H. Rastetter, and William Rohn.

information as to exactly what “inside” information Bucknum allegedly possessed, when he possessed it, how he came to possess it, or, even assuming that he did, how he allegedly used it in furtherance of his own trades. Instead, Plaintiffs make assertions that are entirely conclusory in nature. In fact, as best one can discern from their tortured pleadings, Plaintiffs would imply that because Bucknum sold Biogen shares at a time when the other defendants (referred to as “Individual Defendants” in the Amended Complaint) were allegedly aware of the “true risks” of Tysabri, he is somehow liable for insider trading under Section 20A. Even assuming, *arguendo*, that Plaintiffs had sufficiently plead that these risks with Tysabri existed, that this constituted material information, and that the Individual Defendants were aware of that information and wrongfully failed to disclose it to investors (which is disputed), there is absolutely no basis in the Amended Complaint for connecting that information to Bucknum and his trades.

Finally, regarding the one trade by Bucknum as to which the Amended Complaint provides even the barest of information (the February 18, 2005 trade), Bucknum has fully disgorged all of his profits relating to that trade in a settlement with the United States Securities and Exchange Commission (“SEC”) and is entitled, under the express provisions of Section 20A, to a full offset against Plaintiffs. With respect to the February 18, 2005 trade, therefore, Bucknum’s disgorgement of all profits to the SEC constitutes a bar to any further recovery by Plaintiffs and an additional reason why that claim must be dismissed.

Indeed, it is obvious that Plaintiffs have only added Bucknum to this action at this late date in the hope of utilizing the mere fact of his settlement with the SEC (pursuant to

which he admitted no wrongdoing) to obscure the deficiencies in their pleadings and claims. Those deficiencies, however, are glaring and fatal and Plaintiffs claim against Bucknum must be dismissed.

BACKGROUND

On October 13, 2006, over 19 months after the original complaint was filed, Plaintiffs filed the present Amended Complaint purporting to assert three counts: Count I against Biogen and the so-called Individual Defendants (which does not include Bucknum) pursuant to Section 10(b) of the Exchange Act; Count II against the Individual Defendants (which does not include Bucknum) pursuant to Section 20(a) of the Exchange Act; and Count III against the so-called “Section 20A Defendants” (which includes Bucknum) pursuant to Section 20A of the Exchange Act. (Amended Complaint, ¶¶ 39-40, 413-35). Bucknum was not a party defendant prior to the filing of the Amended Complaint.

Notwithstanding the length of the Amended Complaint, it sets forth very few allegations related to Bucknum, and the few that exist are conclusory and inadequate in nature. To put Plaintiffs’ claim against Bucknum in proper perspective, however, it is best to start with a summary of the allegations in the Amended Complaint that are not made against him.

At bottom, the Plaintiffs allege that Biogen and the Individual Defendants (again which does not include Bucknum) were aware throughout the purported Class Period of certain risks or safety issues related to the company’s product, Tysabri. (*See generally* Amended Complaint). Nowhere in the Amended Complaint do Plaintiffs allege (nor could they) that Bucknum was aware of these alleged risks or safety issues, that he was in

a position to be aware of this alleged information, or that he was capable of understanding the alleged significance of the information even if he was exposed to it. (*Id.*). Plaintiffs further allege that Biogen and the Individual Defendants withheld this information from investors and instead issued and made misleading public statements about Tysabri and the potential market for that drug. (*Id.*). Moreover, Plaintiffs do not allege (nor could they) that Bucknum was engaged in making any such misleading statements. (*Id.*). Finally, Plaintiffs allege that the Individual Defendants engaged in this allegedly wrongful conduct in order to, among other things, inflate Biogen's stock price, so that they and other unidentified "Biogen insiders" could sell their personally held shares in the company at inflated prices. (*Id.*). Plaintiffs do not allege (nor could they) that Bucknum engaged in this allegedly wrongful conduct for this purpose. (*Id.*). Further, plaintiffs fail to even identify him as one of the unidentified "Biogen insiders" who profited from this alleged scheme by the Individual Defendants. (*Id.*).

Ultimately, Plaintiffs' allegations against Bucknum in the 435 paragraph Amended Complaint are reduced to the bald, non-specific assertion that he sold Biogen stock during the Class Period "while privy to material, non-public information, which had not been disclosed to the investing public, including Plaintiffs and Class members who purchased Biogen common stock contemporaneously with [his] sales . . ." (Amended Complaint, ¶ 38). The alleged offending trades by Bucknum took place on May 4, 2004,³ May 25, 2004, November 30, 2004, and February 18, 2005. (Amended Complaint, ¶ 391). Nowhere in the Amended Complaint, however, do Plaintiffs identify the alleged

³ Although a chart on page 135 of the Amended Complaint lists May 4, 2004 as one of the dates on which Bucknum sold Biogen stock, on at least one occasion, this date is seemingly identified as March 4, 2004. (*See* Amended Complaint, ¶ 394).

“material, non-public information.” (*See generally* Amended Complaint). Nor do they (or could they) provide any information to suggest how or when Bucknum came to be privy to that information. (*Id.*). Moreover, at no point do Plaintiffs provide any nexus between his alleged possession of that “material, non-public information” and any trades. (*Id.*).

The only Bucknum trade with respect to which Plaintiffs provide any factual information is a sale on February 18, 2005. (Amended Complaint, ¶¶ 9-10, 339-40, 394). According to the Amended Complaint, Bucknum sold shares on that date after learning at 12:00 p.m. that day in a meeting with other Biogen senior officers that a patient participating in a Tysabri clinical trial had been diagnosed with PML. The Amended Complaint further alleges, however, that Bucknum entered into a civil settlement with the SEC regarding that sale, pursuant to which he disgorged all of his profits from that sale. (Amended Complaint, ¶¶ 10, 340). While Plaintiffs undoubtedly have seized upon that settlement to draw Bucknum into this action and attempt to use the mere fact of that settlement to obscure the failings in their pleadings, they fail to note in their Amended Complaint, though it is clear from the documents that they reference, that Bucknum admitted no wrongdoing as part of that settlement. Moreover, his disgorgement of his profits from that sale forever precludes Plaintiffs from recovering damages against him relating to that sale.

In an effort to satisfy the temporal requirement of their Section 20A claim, Plaintiffs allege in conclusory fashion that they “purchased Biogen common stock contemporaneously with the sales of the Company’s stock by the Section 20A Defendants.” (Amended Complaint, ¶ 427.) Rather than make specific contemporaneous

trade allegations, Plaintiffs, in one paragraph, simply list 46 different trade dates (some of which span multiple days) and generally state that “Plaintiffs and Class members . . . purchased Biogen common stock contemporaneously with the sales by the Section 20A Defendants on at least the following dates,” without identifying which Plaintiff allegedly traded contemporaneously with which Section 20A Defendant on which date(s) and without even identifying whether the Plaintiff purchased or sold the securities. (Amended Complaint, ¶ 430).

Instead of specifically alleging in the text of the Amended Complaint which Plaintiffs’ trades were contemporaneous with trades by which particular Section 20A Defendants, the Amended Complaint simply provides for each of the six Plaintiffs (without identification of any particular date or e-filing system document identification number) that each of the Plaintiffs “previously filed a certification in this Court in connection with the Motion of the Biogen Institutional Investor Group for Consolidation, Appointment as Lead Plaintiff, and Approval of Lead Plaintiffs’ Selection of Co-Lead Counsel and Liason Counsel . . . reflecting its transactions in Biogen common stock during the Class Period, which is incorporated by reference herein.” (Amended Complaint, ¶ 24; *see also* Amended Complaint, ¶¶ 25-29). Having been given little guidance from the Amended Complaint regarding which of the close to 100 docket entries in this case Plaintiffs intended to “incorporate[] by reference,” undersigned counsel was finally able to locate a chart prepared by Plaintiffs that purports to list the various dates on which Plaintiffs allegedly purchased and sold Biogen stock during the Class Period. (Amended Complaint, ¶¶ 24-29). The chart was attached as Exhibit B to the “Declaration of Nancy Freeman Gans in Further Support of the Motion of the Biogen

state a viable claim. *See Carney v. Cambridge Tech. Partners, Inc.*, 135 F. Supp. 2d 235, 243 (D. Mass. 2001) (observing that it is “quite plain” that “plaintiffs must first adequately plead a predicate violation of the Exchange Act or its rules and regulations” to state a claim under Section 20A); *In re Parametric*, 300 F. Supp. 2d at 224 (noting that “[t]o establish an individual’s liability under section 20A, the plaintiff must allege and prove a predicate violation of the Exchange Act”); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 541 (3d Cir. 1999) (noting that “claims under section 20(A) are derivative, requiring proof of a separate underlying violation of the Exchange Act”); *Jackson Nat’l Life Ins. Co. v. Merrill Lynch & Co., Inc.*, 32 F.3d 697, 703 (2d Cir. 1994) (rejecting “Jackson National’s invitation to disregard the statute’s plain language and apply the statute in the absence of an independent violation of the ‘34 Act”); *In re Verifone Sec. Litig.*, 11 F.3d 865, 872 (9th Cir. 1993) (“Shareholders concede that if they have failed to allege an actionable independent underlying violation of the ’34 Act, they similarly cannot maintain a claim under § 20A.”); and *Hogan v. Piasecki*, No. 96 C 7399, 1997 WL 260345, at *1 (N.D. Ill. May 7, 1997) (dismissing with prejudice plaintiffs’ Section 20A claim due to their complete and utter failure to “set forth [a] claim under any other provision of the 1934 Act”). In the present case, it is undisputed that Plaintiffs have not plead, adequately or otherwise, a predicate violation of the Exchange Act against Bucknum. The Section 20A claim against him, therefore, fails to satisfy this fundamental requirement and must be dismissed.

Typically, where courts have dismissed Section 20A claims for failure to plead a predicate violation of the Exchange Act, the plaintiffs have at least attempted to plead a predicate violation, only to have that predicate claim dismissed as inadequate. *See, e.g.,*

Carney, 135 F. Supp. 2d at 257 (“Because the plaintiffs have not stated a [viable] claim under Section 10(b), their Section 20A claim also fails.”); *In re Parametric*, 300 F. Supp. 2d at 224 (holding that since plaintiffs’ attempt to plead a predicate violation under Section 10(b) of the Exchange Act “has been unsuccessful, they are necessarily unable to plead a claim for liability under Section 20A”); *In re Advanta Corp.*, 180 F.3d at 541 (“Because plaintiffs have failed to plead a predicate violation of Section 10(b) or Rule 10b-5, the Section 20(A) claim must also be dismissed.”; and *In re Verifone*, 11 F.3d at 872 (dismissing plaintiffs’ Section 20A claim after rejecting their predicate claims under Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder). Here, Plaintiffs have not even attempted to plead, never mind adequately plead, a predicate violation against Bucknum (nor could they). (*See* Amended Complaint, ¶ 38 (“Plaintiffs bring a claim against Defendant Bucknum solely pursuant to Section 20A of the Exchange Act.”)(emphasis added)). Having unquestionably failed to plead a predicate Exchange Act violation by Bucknum, Plaintiffs’ Section 20A claim against him must necessarily fail.

Instead, Plaintiffs, in complete disregard of the language of Section 20A and the controlling case law, suggest that they are not required to assert an independent Exchange Act claim against Bucknum because “Section 20A does not require [that they plead] a predicate Exchange Act violation by *each* insider.” (Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Revised Motion to Dismiss the Consolidated Class Action Complaint, p. 29 (emphasis in original)). According to the Plaintiffs, therefore, they need not plead a predicate violation against Bucknum, provided that they have plead a

proposition that Plaintiffs need not plead a predicate Exchange Act violation against the Section 20A defendant provided a predicate Exchange Act claim is asserted against another named defendant, particularly where there was only one defendant in the case, is difficult to comprehend.

Likewise, there is absolutely nothing in the *Johnson* case cited by Plaintiffs that supports their facially invalid assertion. *See* 394 F. Supp. 2d 1184. Once again, unlike the present Plaintiffs, the *Johnson* plaintiffs did include in their complaint a predicate claim against the Section 20A defendant under Section 10(b) of the Exchange Act, and the question in that case (unlike in the instant case) was whether the running of the statute of limitation on the predicate claim barred a claim under Section 20A. *See id.* at 1196. Indeed, the *Johnson* decision only serves to reinforce the need to plead adequately a predicate violation to sustain a Section 20A claim. *See id.* (“Unquestionably, Plaintiff must plead and prove the predicate claim in order to prevail on his § 20A claim”) (emphasis added).

Finally, nowhere in *In re Enron* cited by Plaintiffs is there support for the argument that Section 20A allows them to proceed with a Section 20A claim against Bucknum by virtue of their having plead a predicate claim under the Exchange Act against another defendant. *See* 258 F. Supp. 2d 576. In *In re Enron*, as in *Quaak* and *Johnson*, the plaintiffs again asserted an independent claim (pursuant to Section 10(b)) against the Section 20A defendants, and the court recognized that the pleading of such an independent violation was central to plaintiffs’ Section 20A claim. *See id.* at 599 (“To plead a § 20A cause of action, the plaintiff must . . . allege a requisite independent,

predicate violation of the Exchange Act (or its rules and regulations) . . .”). *In re Enron*, 258 F. Supp. 2d at 599.

In sum, it is an absolute precondition to the maintenance of a Section 20A claim that the moving party plead and prove a predicate violation of the Exchange Act, independent of Section 20A itself, by the defendant against whom the Section 20A claim is brought. It is undisputed that Plaintiffs have failed to clear this most basic hurdle. Their Section 20A claim against Bucknum (their only claim against Bucknum), therefore, must be dismissed.

B. Plaintiffs Cannot Satisfy The Contemporaneous Trading Requirement Of Section 20A.

As previously noted, Section 20A requires that the Plaintiffs allege that their purchase of Biogen stock was appropriately “contemporaneous” with the four allegedly violative sales by Bucknum on (1) May 4, 2004; (2) May 25, 2004; (3) November 30, 2004; and (5) February 18, 2005. *See* 15 U.S.C. §78t-1(a). (Amended Complaint, ¶ 391) For the reasons set forth below, the Plaintiffs failed to satisfy their burden with respect to any of the four transactions and, therefore, lack standing to pursue the present Section 20A claim.

1. Courts in the First Circuit require a plaintiff to allege a trade within one day after defendant’s transaction.

Section 20A only provides for a private right of action to buyers and sellers of securities that trade “contemporaneously” with an insider in possession of material nonpublic information. *See* 15 U.S.C. § 78t-1(a). This contemporaneous requirement is a product of the fact that identifying the party in actual privity with the alleged defendant

standing as a contemporaneous trader.”) (citing *Backman v. Polaroid Corp.*, 540 F. Supp. 667, 671 (D. Mass. 1982) (“The purchases of Polaroid stock by Anderson 4 days (2 trading days) after the Jurodin sale, and by Model 11 days (7 trading days) after the sale are outside of the period of insider trading; therefore, those plaintiffs lack standing to sue on their claims against Silver and Jurodin. The motions to dismiss must be allowed as to the claims regarding the stock purchases of Anderson and Model.”); *see also In re Stratus Computer, Inc. Sec. Litig.*, No. 89-2075-Z, 1992 WL 73555, at *6 (D. Mass. Mar. 27, 1992) (finding plaintiff must allege trade on the “same day” as defendant’s trade to be contemporaneous) (emphasis added).

In addition to the one day temporal requirement, courts in this district and elsewhere have uniformly interpreted the contemporaneous trading requirement to apply only to plaintiff’s trades that occur after the alleged wrongful insider transaction. *See, e.g., Backman*, 540 F. Supp. at 670 (“Notwithstanding plaintiffs’ allegations of concerted action, Jurodin cannot be liable for purchases which occurred before it sold its 19,600 shares, allegedly upon inside information”); *In re Verifone*, 784 F. Supp. at 1489 (“No liability can attach for trades made by plaintiffs before the insider engages in trading activity.”); *In re Enron*, 258 F. Supp. 2d at 600 (observing “the plaintiff’s trades must have taken place after the challenged insider trading transaction”); *In re MicroStrategy*, 115 F. Supp. 2d at 664 n.91 (“According to the Complaint, Defendants Saylor, Bansal, Lynch, and Terkowitz traded *after* Plaintiff Schwartz traded. Schwartz cannot, therefore, raise a Section 20A claim against these Defendants, as her trade was not contemporaneous with these Defendants’ trades.”) (emphasis in original); *Alfus v. Pyramid Tech. Corp.*, 745 F. Supp. 1511, 1522 (N.D. Cal. 1990) (observing “courts have

interpreted the ‘contemporaneous trading’ requirement [of Section 20A] quite strictly . . . a plaintiff’s trade must have occurred *after* the wrongful insider transaction”) (emphasis in original).

2. The Amended Complaint fails to allege contemporaneous trades by Plaintiffs as to any of the four allegedly wrongful sales by Bucknum.

Notwithstanding the need to plead the contemporaneous trading requirement of Section 20A with particularity, *see, e.g., Newbronner v. Milken*, 6 F.3d 666, 670 (9th Cir. 1993) (“contemporaneous trading is necessarily a ‘circumstance constituting fraud’ because an insider can not be liable to a private party under Section 10(b) and Rule 10b-5 without having traded contemporaneously; thus, contemporaneous trading must be pleaded with particularity under [Rule 9(b)].”), the Amended Complaint simply alleges in conclusory fashion that Plaintiffs “purchased Biogen common stock contemporaneously with the sales of the Company’s stock by the Section 20A Defendants” (Amended Complaint, ¶ 427). Nowhere in the 435-paragraph Amended Complaint do Plaintiffs identify the actual dates of the alleged “contemporaneous” trades with Bucknum. (*See generally* Amended Complaint). Moreover, rather than specific contemporaneous trade allegations, the Amended Complaint, in paragraph 430, simply lists 46 different trade dates (some of which span multiple days) and generally provides that “Plaintiffs and Class members” “purchased Biogen common stock contemporaneously” with “the Section 20A Defendants” collectively on these 46 different trade dates, wholly failing to identify which Plaintiff allegedly traded contemporaneously with which Section 20A Defendant on which date. (Amended Complaint, ¶ 430). This absence of particularity alone should be fatal to their Section 20A claim. *See Carney*, 135 F. Supp. 2d at 257

detailed chart attached as Exhibit A, makes clear that the trades by Plaintiffs on February 18, 2005 were sales of Biogen stock, not purchases of that stock. As noted hereinabove, however, to satisfy the contemporaneity requirement with respect to Bucknum's sale of stock on February 18, 2005, Plaintiffs must allege a purchase made contemporaneous with the Bucknum sale. *See* 15 U.S.C. §78t-1(a). The purchase closest in time to the February 18, 2005 sale by Bucknum is identified in the chart attached as Exhibit A, a purchase on February 22, 2005, four full days after the allegedly wrongful sale and well beyond the one day contemporaneity requirement. Like the transactions on May 4, 2004, May 25, 2004, and November 30, 2004, the allegedly wrongful trade by Bucknum on February 18, 2005 must be dismissed for failure to meet the contemporaneity requirement of Section 20A.

III. PLAINTIFFS HAVE FAILED TO PLEAD THEIR SECTION 20A CLAIM AGAINST BUCKNUM WITH THE HEIGHTENED PARTICULARITY REQUIRED BY RULE 9(B).

Because Plaintiffs' Section 20A claim against Bucknum sounds in fraud, the Amended Complaint is subject to the heightened pleading requirements of Rule 9(b). *See* Fed R. Civ. P. 9(b); *see also*, *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101, 1131 (W.D. Mich. 1996) ("Section 20A claims sound in fraud and must therefore be pled with particularity under Fed. R. Civ. P. 9(b)."); *AST Research Sec. Litig.*, 887 F. Supp. 231, 235 (C.D. Cal. 1995) (similar). Here, Plaintiffs have completely and utterly failed to plead their Section 20A claim with the requisite particularity. Indeed, Plaintiffs have provided virtually no particularity at all. Instead, they rely upon

purely conclusory allegations, which are insufficient to adequately plead a Section 20A claim.⁶

With the exception of certain minimal facts provided with respect to the February 18, 2005 trade, Plaintiffs provide no specific information as to exactly what “inside” information Bucknum allegedly possessed, when he possessed it, how he came to possess it, whether he was in a position, or otherwise had the capacity, to understand the implication of it, or, even assuming that he did, how he allegedly used it in furtherance of his own trades. Instead, Plaintiffs appear to hope that the Court’s view of their allegations (or lack thereof) against Bucknum will be blurred by the endless allegations in the Amended Complaint that Biogen and the Individual Defendants were aware of certain risks or safety issues with Tysabri and withheld that information from investors, while making misleading public statements about Tysabri and the potential market for that drug. While they provide no nexus between Bucknum and this alleged information and these alleged misleading statements, they either hope that the Court does not notice or apparently would imply that because Bucknum sold Biogen shares at a time when the Individual Defendants were allegedly aware of the “true risks” of Tysabri, he is somehow liable for insider trading under Section 20A. In either case, Plaintiffs have failed to plead a Section 20A claim against Bucknum with proper particularity. Even assuming,

⁶ The Amended Complaint does not even come close to alleging facts, with specificity, sufficient to show that Bucknum violated the Exchange Act through insider trading, such as alleging that Bucknum traded with the requisite scienter. *See In re Atlantic Fin. Mgt., Inc. Sec. Litig.*, MDL No. 584, 1988 WL 163038, at *2 (D. Mass. Dec. 6, 1988) (“In order to prove that a corporate insider engaged in prohibited insider trading, a plaintiff must show (1) that the defendant possessed material inside information which the investing public did not; and (2) that he acted with scienter when he sold his shares in possession of that knowledge; and (3) that the plaintiff trade contemporaneously with him, and hence was injured thereby.” (citing *S.E.C. v. MacDonald*, 699 F.2d 47 (1st Cir. 1983)).

therefore, that they can satisfy the predicate Exchange Act violation and contemporaneity requirements (which they can't), this serves as an independent basis for dismissing Plaintiffs' claim.

IV. BUCKNUM HAS ALREADY DISGORGED ANY PROFITS HE RECEIVED RELATED TO HIS FEBRUARY 18, 2005 TRADE, AND THUS, PLAINTIFFS MAY NOT RECOVER ANY DAMAGES REGARDING THIS TRADE.

The fact that Bucknum has disgorged all profits he received relating to his February 18, 2005 sale of Biogen stock constitutes an independent basis for dismissing the Section 20A claim as to that transaction. Section 20A expressly provides as follows: “[t]he total amount of damages imposed against any person under [Section 20A] shall be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the [SEC] in a proceeding brought under section 78u(d) of this title relating to the same transaction or transactions.” 15 U.S.C. § 78t-1(b)(2). Additionally, Section 20A provides that “[t]he total amount of damages imposed [under Section 20A] shall no exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation.” 15 U.S.C. § 78t-1(b)(1); *see also In re Enron*, 258 F. Supp. 2d at 601.

Plaintiffs concede in the Amended Complaint that Bucknum has already disgorged all profits relating to his February 18, 2005 transaction as part of a settlement agreement with the SEC. *Compare* Amended Complaint, ¶¶ 10, 340 (discussing SEC settlement and Bucknum's payment to SEC of “\$3 million in disgorgement, interest and penalties”) and Amended Complaint, ¶ 394 (alleging Bucknum made a profit of approximately \$1.9 million from his February 18, 2005 trade), *with* Exhibit B, Final Judgment, at 3 (ordering Bucknum to disgorge “\$1,938,465, representing profits gained”

from Bucknum's February 18, 2005 trade) (emphasis added). Thus, no damages are further recoverable from Bucknum under Section 20A relating to the February 18, 2005 transaction. *See* Donald C. Langevoort, 18 Insider Trading Regulation, Enforcement and Prevention § 9.6 (2006) ("To the extent the SEC has already obtained full disgorgement, the ability to recover disappears entirely.").

CONCLUSION

For the foregoing reasons, the Court should grant this present motion and dismiss Count III of the Amended Complaint against Bucknum with prejudice.

Respectfully submitted,

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Dated: January 10, 2007

CERTIFICATE OF SERVICE

I, Edward E. Hale, Jr., hereby certify that on January 10, 2007, a true copy of the foregoing document was filed through the ECF system and served electronically upon registered ECF participants as identified on the Notice of Electronic Filing, and I further certify that paper copies of the foregoing document will be sent to counsel of record not registered with ECF on January 10, 2007.

/s/ Edward E. Hale, Jr.
Edward E. Hale, Jr.

EXHIBIT A

EXHIBIT B

3. At approximately 12:00 p.m. that day, Bucknum attended a meeting at which he and other senior officers of Biogen learned that a patient participating in a clinical trial of Biogen's multiple sclerosis drug had been diagnosed with a rare and fatal brain disease, and that another patient also may have contracted the disease. This was material, nonpublic information which had a significant negative impact on Biogen's stock price when Biogen later announced it to the public.

4. At approximately 1:30 p.m. that day, Bucknum had a telephone conversation with his broker's associate in which he instructed the broker's associate to sell the 89,700 shares of his Biogen stock at the market price, which was then around \$67 per share. Bucknum's shares were sold shortly thereafter.

5. By virtue of his conduct, Bucknum engaged in fraud in the offer or sale of securities in violation of Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)], and in connection with the purchase or sale of securities in violation of Section 10(b) of the Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]. Accordingly, the Commission seeks the following relief against Bucknum: (i) the entry of a permanent injunction prohibiting Bucknum from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]; (ii) disgorgement of Bucknum's ill-gotten gains from his insider trading, plus prejudgment interest thereon; (iii) the imposition of a civil monetary penalty; and (iv) an order prohibiting Bucknum from acting as an officer or director of a publicly-traded issuer.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to Sections 20(b) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(b) and 77v(a)] and Sections 21, 21A and 27 of the Exchange Act [15 U.S.C. §§ 78u, 78u-1, 78aa].

7. The Commission seeks a permanent injunction and disgorgement pursuant to Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)] and Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u(d)(1)]. The Commission seeks the imposition of a civil monetary penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21A of the Exchange Act [15 U.S.C. § 78u-1]. The Commission seeks an order prohibiting Bucknum from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports with the Commission pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)], pursuant to Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)] and Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)].

8. Venue is proper in this District because Biogen, the publicly-traded issuer, is located here, and many of the activities alleged in this Complaint took place here.

9. In connection with the conduct described in this Complaint, Bucknum directly or indirectly made use of the mails or the means or instruments of transportation or communication in interstate commerce or the means or instrumentalities of interstate commerce or the facilities of a national securities exchange.

DEFENDANT AND RELEVANT ENTITY

10. **Bucknum**, age 59, was Biogen's general counsel from June 1999 through March 2005, when he resigned. He is currently a resident of Centerville, Delaware, but was a resident of Boston, Massachusetts during the relevant period.

11. **Biogen** is a biotechnology company with headquarters in Cambridge, Massachusetts. Biogen's common stock is (and was during the relevant period) registered with the Commission pursuant to Section 12(g) of the Exchange Act [15 U.S.C. § 78l(g)] and is traded on the NASDAQ National Market System.

STATEMENT OF FACTS

Background Regarding Bucknum's Transaction

12. At approximately 8:45 a.m. on February 18, 2005, before the opening of the market, Bucknum had a telephone conversation with his stock broker. Bucknum told the broker that he wanted to exercise options to purchase 89,700 shares of Biogen stock and sell the shares from that exercise. As a result of that conversation, the broker understood that Bucknum wanted to sell the shares at a price of \$68 per share or better. Biogen's common stock had closed at a price of \$67.57 per share on the previous day.

13. Biogen's trading policies and procedures required that Bucknum obtain clearance from Biogen's legal department before trading Biogen stock. Following his conversation with Bucknum, the broker instructed his associate to contact Biogen's legal department, obtain the necessary clearance and complete Bucknum's transaction.

14. The broker's associate received clearance from Biogen's legal department for Bucknum's transaction at approximately 10:00 a.m. Within the next hour, the broker's associate

telephoned Bucknum in an attempt to verify the details of the transaction before completing it.

The broker's associate did not reach Bucknum but left a message for him.

Bucknum Learns Material, Nonpublic Information

15. At approximately 12:00 p.m. that day, Bucknum and other Biogen senior officers attended a meeting at which they learned that a patient participating in a clinical trial of Biogen's multiple sclerosis drug, Tysabri, had been diagnosed with progressive multifocal leukoencephalopathy ("PML"), a rare and often-fatal brain disease, and that another patient participating in a Tysabri clinical trial had an unconfirmed PML diagnosis. Various Biogen medical, regulatory and drug safety personnel attended this meeting.

16. The information regarding the confirmed and unconfirmed PML diagnoses was material, nonpublic information that was likely to have a negative impact on Biogen's stock price. The information in fact did have such an impact after Biogen disclosed it publicly and suspended the marketing of Tysabri ten days later.

17. Immediately following the noon meeting, which ended at approximately 1:00 p.m., Bucknum met with Biogen's chief executive officer and executive chairman, and they decided to schedule an emergency telephonic meeting of Biogen's Board of Directors for later that day to inform the Board of the confirmed and unconfirmed PML diagnoses.

Bucknum Sells Biogen Stock

18. At approximately 1:30 p.m., Bucknum returned to his office and telephoned the broker's associate, and they spoke for a few minutes. The broker's associate told Bucknum that he had received clearance from Biogen for Bucknum's transaction and that the stock was trading near \$68. Bucknum then instructed the broker's associate to sell his shares at the market price.

25. Bucknum knew or was reckless in not knowing that when he sold Biogen stock while in possession of material, nonpublic information, he breached a duty that he owed to Biogen and its shareholders.

CLAIMS FOR RELIEF

First Claim for Relief
(Violation of Section 17(a) of the Securities Act)

26. The Commission repeats and incorporates by reference the allegations in paragraphs 1 through 25 of the Complaint as if set forth fully herein.

27. As set forth above, Bucknum obtained material, nonpublic information about Biogen and then sold shares of Biogen stock while in possession of that information in breach of his fiduciary duty to Biogen and its shareholders. Bucknum profited by selling his Biogen stock before Biogen's stock price declined following the public disclosure of the information.

28. By reason of the foregoing, Bucknum, directly or indirectly, acting intentionally, knowingly or recklessly, by use of the means or instruments of transportation or communication in interstate commerce or of the mails, in the offer or sale of securities: (a) employed a device, scheme or artifice to defraud; (b) obtained money or property by means of an untrue statement of material fact or omitting to state a material fact necessary to make the statement made, in light of the circumstances under which it was made, not misleading; or (c) engaged in a transaction, practice or course of business which operated as a fraud or deceit upon purchasers of Biogen stock.

29. As a result, Bucknum violated Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

Second Claim for Relief
(Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder)

30. The Commission repeats and incorporates by reference the allegations in paragraphs 1 through 25 of the Complaint as if set forth fully herein.

31. As set forth above, Bucknum obtained material, nonpublic information about Biogen and then sold shares of Biogen stock while in possession of that information in breach of his fiduciary duty to Biogen and its shareholders. Bucknum profited by selling his Biogen stock before Biogen's stock price declined following the public disclosure of the information.

32. By reason of the foregoing, Bucknum, directly or indirectly, acting intentionally, knowingly or recklessly, by use of the means or instrumentalities of interstate commerce or of the mails or of the facilities of a national securities exchange, in connection with the purchase or sale of securities: (a) employed a device, scheme or artifice to defraud; (b) made an untrue statement of material fact or omitted to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not misleading; or (c) engaged in an act, practice or course of business which operated as a fraud or deceit upon other persons, including purchasers of Biogen stock.

33. As a result, Bucknum violated Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

PRAYER FOR RELIEF

WHEREFORE, the Commission requests that this Court:

- A. Enter a permanent injunction prohibiting Bucknum from directly or indirectly violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];
- B. Require Bucknum to disgorge the ill-gotten gains from his insider trading, plus prejudgment interest thereon;
- C. Order Bucknum to pay a civil monetary penalty;
- D. Prohibit Bucknum from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78f] or that is required to file reports with the Commission pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)];

E. Retain jurisdiction over this action to implement and carry out the terms of all orders and decrees that may be entered; and

F. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,



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District Administrator

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Dated: January 12, 2006

Case 1:06-cv-10065-PBS Document 7 Filed 02/09/2006 Page 2 of 5

Case 1:06-cv-10065-PBS Document 6 Filed 02/06/2006 Page 2 of 5

- (b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

II.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Case 1:06-cv-10065-PBS Document 7 Filed 02/09/2006 Page 4 of 5

Case 1:06-cv-10065-PBS Document 6 Filed 02/06/2006 Page 4 of 5

Investment System ("CRIS"). These funds, together with any interest and income earned thereon (collectively, the "Fund"), shall be held by the CRIS until further order of the Court. In accordance with 28 U.S.C. § 1914 and the guidelines set by the Director of the Administrative Office of the United States Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on the money in the Fund a fee equal to ten percent of the income earned on the Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States.

The Commission may by motion propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Defendant shall not, after offset or reduction of any award of compensatory damages in any Related Investor Action based on Defendant's payment of disgorgement in this action, further benefit by offset or reduction of such compensatory damages award by the amount of any part of Defendant's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Defendant shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a "Related Investor

Case 1:06-cv-10065-PBS Document 7 Filed 02/09/2006 Page 5 of 5

Case 1:06-cv-10065-PBS Document 6 Filed 02/06/2006 Page 5 of 5

Action" means a private damages action brought against Defendant by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

VII.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated: 2/9/06


UNITED STATES DISTRICT JUDGE